IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
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ORDER
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MADAN SINGH VS SMT. KESHAR DEVE

S.B. CIVIL REVISION PETITION NO.469/2004 AGAINST THE ORDER DATED 4.11.2004, PASSED BY LEARNED DISTRICT JUDGE, CHURU SHRI C.P. SINGH, RHJS, IN CIVIL APPEAL NO.70/2004

DATE OF ORDER : 29.8.2005

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Sajjan Singh, for the petitioner.
Mr. BM Bhojak, for the respondent.
Mr. Rajesh Panwar, for the learned counsel, who appeared for the petitioner before the trial court.

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Heard learned counsel for the parties.

Brief facts of the case are that a suit for eviction was filed by the landlord-respondent against the appellant-defendant in the trial court on 19.2.2000. In the suit, summons were served upon the defendant-appellant and power was filed by his advocate. In the trial court on 2nd April, 2004, learned counsel for the defendant-appellant pleaded no instruction, upon which the trial court passed the order to proceed ex-

parte. Ultimately, the suit of the plaintiff was decreed ex-parte on 28th April, 2004 . The appellant-defendant submitted application under Order 9 Rule 13 CPC before the trial court on 19.10.2004 alongwith the application under Section 5 of the Limitation Act. The trial court dismissed the petitioner's application for setting aside the ex-parte decree by order dated 1.10.2004 holding that the application of the appellant-defendant is barred by time. The appellant-defendant-tenant preferred appeal against the trial court's order dated 1st Oct., 2004 and the appellate court dismissed the appeal of the present petitioner-tenant by order dated 4th Nov., 2004. Hence, this revision petition.

It will be worthwhile to mention here that this Court on 17.12.2004 (Brother Justice Sh. N.P. Gupta) to find out facts from petitioner's trial court advocate, who pleaded no instruction directed the petitioner to deposit cost of Rs.10,000/- for the inconvenience, which may be caused to learned advocate in case he is called upon to explain his position, issued notice to learned counsel, who appeared for the petitioner in the trial court. The learned trial court counsel submitted reply/affidavit before this Court in response to the court's notice and submitted that he was engaged as advocate to contest the case on behalf of the petitioner and he filed the 'Vakalatnama' and, thereafter, written statement in the suit. The trial court determined the rent on 13th July, 2001 and on the same day, a information Postcard

was sent by the learned counsel for the petitioner informing the petitioner about the determination of the rent. He also sent his junior Mr. Ajay Bhati to the shop of the petitioner on the same very day as the petitioner's shop is situated near the court premises only. Learned counsel also informed the petitioner that an application under Order 13 Rule 5 CPC of the Rajasthan (Control of Rent and Eviction) Act has been filed whereby the plaintiff is seeking order of stricking off defence of the petitioner. Despite all efforts, the petitioner did not contact the learned advocate. It is also submitted that learned counsel gave yet another Postcard on 30th May, 2003 to the petitioner and, thereafter, informations were sent to the petitioner by Postcards dated 28th August, 2003, 7th Feb., 2004 and 27th Feb., 2004. It is stated on oath that in fact, the notice dated 27th Feb., 2004 was a notice informing the petitioner that in case the petitioner will not contact then there will be no response of the advocate and lastly, a notice through courier was sent by the counsel to the petitioner on 17.3.2004.

Learned counsel for the petitioner vehemently submitted that the two courts below committed serious error in dismissing the petitioner's application filed under Order 9 Rule 13 CPC on the ground of limitation. It is submitted that petitioner is a shopkeeper and there was no reason for him for not contesting the suit when he engaged the advocate. It is submitted that no notice was ever given by the learned counsel before

pleading no instruction in the trial court and in view of the judgments of the Hon'ble Supreme Court, it is clear that where notice is not given by the counsel before pleading no instruction then the ex-parte decree deserves to be set aside. It is also submitted that his counsel, who was conducting the case before the trial court on behalf of the petitioner has concocted story of giving Postcards to the plaintiff and has not submitted the copies of the Postcards and the receipt of the courier by which letter was sent to the petitioner. It is also submitted that in fact, courier receipt is only a fabricated document. Learned counsel for the petitioner further submits that there was no reason for the learned counsel for not placing on record the copies of those documents and petitioner be given opportunity to contest the contention of his counsel. Learned counsel for the petitioner further submits that the ex-parte decree of eviction may be set aside and delay in filing the application may be condoned.

Learned counsel for the plaintiff vehemently submitted that this is a clear case of abuse of process of the court. The suit was filed by the plaintiff in the year 2000. It continued for long, the rent was determined and thereafter, the tenant did not deposit the rent and, thereafter, the advocate of the petitioner pleaded no instruction after giving several letters to the petitioner, which is now more clear. The courts below had no option but to accept the statement of learned

counsel for the petitioner, who pleaded no instruction. Learned counsel for the plaintiff-respondent vehemently submitted that the application under Section 5 of the Limitation Act was filed by the petitioner before the court below, but, in fact, no argument was advanced on that application and otherwise also there is no cause shown by the petitioner for condonation of delay and the trial court in its order dated 1.10.2004 very clearly held that there is no sufficient cause shown by the plaintiff for not filing the application for setting aside the decree dated 28th April, 2004 on 19.8.2004 and hence, the trial court rejected the petitioner's explanation for the delay. According to learned counsel for the plaintiff-respondent, the appellate court considered the application filed under Section 5 of the Limitation Act also and appellate court reached to the conclusion that there is no other ground mentioned by the petitioner for condonation of delay except that he had no knowledge of passing of the decree.

Learned counsel Sh. Rajesh Panwar appearing on behalf of the petitioner's counsel, who appeared before the trial court, has shown the original file of the petitioner's case, which is still lying with the petitioner's counsel. According to learned counsel Sh. Rajesh Panwar the notices was given and this fact has been recorded in the order-sheets maintained by learned counsel for the petitioner in his file. He also refuted the allegation of concocting any story by the counsel and

also submitted that there is no reason to disbelieve the statement of learned counsel for the petitioner, who appeared before the trial court.

I considered the submissions of learned counsel for the parties. It is true that in case when there is a clear case of negligence of advocate, the party cannot be allowed to suffer, but at the same time, a negligent litigant cannot be permitted to put blame upon the advocate. Therefore, when sympathy is claimed by putting allegations against the advocate then they are required to be seen cautiously because of the simple reason that levelling of allegations against the advocate while seeking setting aside of the ex-parte order is the most common allegation as that has been noticed by this Court in several cases. But at the same time, the litigants cannot be made to suffer in case where there is genuine case of even some negligence of the advocate and even of the litigants.

Here in this case, as stated above, the notice was issued to the advocate of the petitioner by this Court to find out the truth in the allegations of the petitioner. The learned trial court's advocate submitted reply supported by affidavit before this Court. Learned counsel has shown the original case file of the petitioner, which has been maintained by the learned counsel very meticulously and looking to the order-sheets as noted down by the learned counsel in the

petitioner's file, the proceedings written in the case file of the learned counsel can be relied upon as there is no cause arises for drawing any doubt against the advocate's writing in the case file of the petitioner. In the case file of the petitioner, apart from all order-sheets, there is a mention of sending Postcards to the petitioner also and in the file there is courier receipt also annexed. The contention of learned counsel for the petitioner that all those documents have come on record before this Court only and he has no opportunity to rebut these allegations. For this it is suffice to say that this was the indulgence of this Court only in calling the learned counsel to explain his position and learned counsel is neither party nor a witness before this Court nor he was witness in trial court. This Court in its discretion thought it fit to find out from the learned counsel, who appeared for the petitioner in the trial court. It is not in dispute that from the year 2000 to 2nd April, 2004, same advocate continued by the petitioner himself in the trial court. Nothing has been disclosed by the petitioner that what was the reason for taking such a step by learned counsel for the petitioner in the year 2004 against the interest of the petitioner and to oblige the non-petitioner. Such type of bald allegations cannot be accepted in any manner because the advocates are also cautious that they may have to face disciplinary proceedings wherein they may have to suffer serious consequences for their lapses. It is made clear that the learned counsel is not a witness either for the plaintiff or for the defendant. It appears that petitioner

wants to take benefit of this situation of issuing notice to the learned counsel by this Court in revision petition to ascertain the truth only from the advocate and wants to make the issue after failing to produce the advocate before the trial court as witness by summoning him.

In view of the above reasons and in views of the facts, which are came on record and clear from the judgment of the trial court dated 28th April, 2004, by the order dated 1st Oct., 2004 and from the order dated 4th Nov., 2004 itself, that the petitioner's application was barred by time and this fact cannot be disputed. So far as question of limitation is concerned, that is 30 days from the date of decree when summons are duly served or party has put in appearance, therefore, question of starting of limitation from the date of knowledge does not arise in this case. The petitioner still had an opportunity to show sufficient case for not filing the application in time, i.e., within 30 days and for that purpose he availed the opportunity by moving application under Section 5 of the Limitation Act. The trial court in its order though not in detail, but clearly mentioned that the petitioner could not show any sufficient cause for filing the application after delay of more than four months, which is recorded in page no.3 of the order of the trial court dated 1st Oct., 2004. The appellate court also clearly observed that the cause shown by the appellant in application under Section 5 of the Limitation Act is not sufficient cause. Therefore, the finding of fact

recorded by the two courts below in absence of sufficient cause for filing the application after delay of four months, the courts below have not committed any error of fact or even error of law.

Apart from above, this Court is satisfied that the suit was field for eviction against the petitioner on 19th Nov., 2000 and the advocate for the petitioner continued to conduct the case till 2nd April, 2004 and during this period, rent was determined and the petitioner-defendant did not deposit the rent and, thereafter, learned counsel for the petitioner before the trial court informed the petitioner about the orders passed against him and requested the petitioner to contact the learned counsel, but he did not contact and the learned counsel had no option but to plead no instruction.

In view of the above, I do not find any merit in the revision petition and the same is hereby dismissed. However, in the interest of justice, it will be just and proper to allow the cost of Rs.5,000/- to the learned counsel who appeared before this Court in response to the notice issued by this Court. Hence, it is ordered that Rs.5,000/- be paid to learned counsel Sh. Manak Chand Bhati and rest of the amount may be refunded to the petitioner.

(PRAKASH TATIA), J.

c.p.goyal/-